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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BENNIE KATZ, ALFRED FINKEL, AND MURRAY KATZ, D/B/A WILLIAMSBURG STEEL PRODUCTS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (II. 435–458)[1] is reported at 289 F. 2d 700. The Decision and Order of the National Labor Relations Board are reported at 126 NLRB 288 (I. 13–37).

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1961. The petition for a writ of certiorari was filed on July 10, 1961, and was granted on

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[1] The transcript of record is reprinted in two volumes. The first volume will be referred to as "I," and the second volume as "II."

October 9, 1961 (II. 460), 368 U.S. 811. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 39–41.

QUESTION PRESENTED

Whether it is an unfair labor practice under Section 8(a) (1) and (5) of the National Labor Relations Act for an employer unilaterally to place into effect new wage rates substantially in excess of any offered the bargaining representative chosen by the employees, to change sick leave policy and to grant merit increases so numerous as to constitute a general wage increase, all without prior consultation with the bargaining representative and at a time when the representative is seeking to negotiate upon those subjects.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On July 5, 1956, the Board certified Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL–CIO, herein called the Union, as collective bargaining representative of all technical employees at respondent Company's plant (I. 20; 6, 45).[1] On the same day, the Board issued certifications to the Union for similar units of employees at five other companies which, along with the

[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

respondent Company, were members of the Hollow Metal Door and Buck Association (I. 20–21; 48).

On July 11, 1956, the Union, by identical letters, requested that the Company and the five other employers make arrangements as quickly as possible "for either individual or Association wide bargaining," and stated that within seven or eight days the Union would submit its proposal for a collective bargaining agreement (I. 21; 52, 261–262). The letters noted that, in accordance with "previous discussions and mutual understanding, the wage rates and/or increases shall be negotiated on an individual Employer basis * * * " (I. 21; 52, 261–262). On July 19, the Union, in a letter to the Company and the other five employers, set forth various subjects for collective bargaining (I. 21; 53, 263–267), mentioning specifically wage rates, merit increase provisions and sick leave policy (I. 264–265). The Union again stated that wage rates and increases were to be negotiated on an individual company basis (I. 21; 53, 266).

When the Company did not reply to these letters, J. L. Raimist, the Union's business manager, put in several phone calls to Sidney D. Raphael, attorney for the Company and the Association. Despite these efforts to arrange an earlier meeting, none was held until August 30, 1956 (I. 21; 53–54). There were ten additional meetings between October 2, 1956, and May 13, 1957,[3] but the parties were unable to reach

[3] In addition to those on August 30 and October 2, 1956, and May 13, 1957, meetings were held on October 18, October 24, November 1, December 5, 1956, and March 29, April 4, April 11, and May 1, 1957 (I. 21).

a final agreement and no further negotiations occurred (I. 21; 58–69, 70–91). On four different occasions during the negotiations and prior to the existence of any impasse, the Company took the following unilateral action with respect to wages or related benefits:

1. *Merit increases.* In its communication to the Company on July 19, 1956, the Union proposed "merit increase provisions" as one of the subjects for collective bargaining (I. 26; 53, 264). Since 1950 the Company had used merit reviews as a basis for granting wage increases to its employees (I. 115, 178, 192). According to Ernst Halpern, the Company's chief draftsman and supervisor of the employees in the bargaining unit (I. 178):

> This system of reviews was in effect since 1950, about, and it used to be about a five-dollar increase every three months, for everybody paid up to sixty-five dollars or so, and five dollars on the average every six months or after, but sometimes management skipped a review for reasons of their own and sometimes they didn't.

Raimist testified that at the first meeting on August 30 it was "definitely established that there would be a joint review on merits," but that the details would be worked out at later meetings (I. 26; 57). Alfred Finkel, the Company partner responsible for labor relations, who participated in all the meetings, testified that the subject was merely mentioned at the meetings on August 30, October 2, and October

10, 1956, with the understanding that negotiations could be conducted at a later date (I. 26; 240, 248, 254). Nevertheless, in October 1956 the Company, without notice to or negotiation with the Union, granted 34 merit increases ranging from $2.50 to $7.50 per week among the 50 employees in the bargaining unit. In January 1957, again without notice to or negotiation with the Union and while bargaining was still going on, 20 members of the bargaining unit were granted merit increases of from $2.00 to $10.00 (I. 26; 98–113, G.C. Ex. 30 (a), (b), (c)). On several occasions Raimist vigorously protested that this action by the Company tended "to destroy the Union" and the "unity of the bargaining unit" (I. 26; 95).

2. *Sick leave policy.* On or about March 11, 1957, while negotiations were still in progress, the Company notified the employees in the bargaining unit of a substantial change in its sick leave policy.[4] The

[4] As of the time negotiations commenced, the Company's sick leave policy allowed employees in the bargaining unit 10 days with pay per year for illness. At the end of the year employees were permitted to accumulate one-half of their unused sick leave up to a maximum of 20 days. Employees who reached the maximum were thereafter paid for one-half of their unused days (I. 278–279). The Company's notice of March 11, 1957, announcing the change in its policy stated (I. 275–276):

> A recent review of our sick leave policy has proved that we have still not achieved our goal of improving attendance. Sick leave is still being abused * * *

change, which cut in half the number of days allowed and increased incentives for good attendance, was retroactive to January 1, 1957 (I. 27; 116–117, 275–276). The Union's letter of July 19, 1956, had listed sick leave as one of the subjects for collective bargaining (I. 264) and it had been discussed at three meetings prior to the Company's March 11, 1957, announcement (I. 27; 57, 62–63, 66). As in the case of the merit increases, the Union was not notified and subsequently filed a vigorous protest (I. 27; 76, 268–269). In its reply, the Company asserted that it did "not feel obligated to explain the matter to you or anyone else since we are not as yet bound to you until an agreement has been reached between us" (I. 27; 76, 270).

3. *Wage rates.* At the meeting on April 4, 1957, the Company offered a three-year contract which would include an immediate $7.50 per week increase for all employees in the bargaining unit plus additional increases of $5.00 at the end of the first and second years of the contract for those employees who were earning less than $90.00 (I. 81–82, II. 369–370). Shortly thereafter, about the middle of April, while negotiations as to this proposal were still going on,

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"Our sick leave policy is changed retroactive to the first of January 1957 in order to increase the benefits for those employees who do not abuse sick leave, and to decrease the benefits for those who do abuse sick leave.

The new policy cut to five the days of sick leave allowed per year and for purposes of accumulation doubled the days remaining unused at the end of the year. The 20-day accumulation limit remained but the Company was to pay for every day unused by employees who had reached the limit rather than only one-half the days as before (I. 275–276).

Ernst Halpern, the Company's supervisor, announced to the employees "that henceforth an automatic wage increase system would be in operation for them as follows: up to $74.99 per week—automatic increase of $5 per week every three months; from $75 to $90 per week—automatic increase of $5 per week every 6 months; over $90 per week—merit increases review every 6 months, raises to be granted in management's discretion on a merit basis" (I. 27; 177). This action was taken without notice to or consultation with the Union (I. 27; 90). The increases were substantially greater than those that the Company had previously offered the Union at the meeting of April 4, 1957 (I. 27; 81).

On May 13, 1957, negotiations between the Company and the Union came to an impasse. Subsequently, during the latter part of July, a meeting of the employees in the bargaining unit was held in the Company's drafting room (I. 24; 121–122). This meeting was conducted during working hours and lasted approximately two hours (I. 24; 146). Halpern was aware of the meeting, and the employees were paid for the time spent in attendance (I. 24; 180–181). Herbert Jacobson, coordinator for the Company and Halpern's aide, acknowledged that the meeting was convened "basically * * * [to] do away with [the Union] as the bargaining agent" because the employees felt they "could do a better job [themselves] than * * * the Union had done" (I. 24; 123–124). At the meeting, which was also attended by Edwin Wisniewski, the Company's chief draftsman, Jacobson read a proposed contract to be pre-

sented to the Company and explained the procedures for resigning from and decertifying the Union (I. 24; 124, 152). By majority vote, the employees decided to present the proposed contract to the Company and to proceed with decertification (I. 24; 124–125). Shortly after this meeting, the Company granted liberal wage increases to nearly every employee in the unit (I. 25; 108–112). These increases exceeded those offered by the Company in its counterproposal of May 8, 1957, the last offer received by the Union before the impasse (I. 25; 81, 87–88, II. 411).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded, as had the trial examiner, that the Company failed to discharge its bargaining obligation and thereby violated Section 8(a) (5) and (1) of the Act when, "without notifying or consulting with the Union," it granted merit increases in October 1956 and January 1957, changed its sick leave policy on or about March 11, 1957, and announced a new automatic wage increase system in April 1957 (I. 13–14, 30–31). The Board found, as had the trial examiner, that the Company "undertook its unilateral actions before negotiations were discontinued in May 1957, or before * * * the existence of any possible impasse" (I. 14, 30).

The Board specifically stated that it was construing "the [examiner's] Intermediate Report as finding violations *only* with respect to the above specified unilateral acts." Noting that the complaint did not allege that the Company "*generally* bargained in bad

faith in the actual negotiations with the Union," the Board "therefore" refused to "adopt the board [sic] statement in the Intermediate Report [I. 31] that '* * * Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union * * *'" (I. 14, n. 4 (emphasis added)).

The Board ordered the Company to cease and desist from (I. 15):

> (a) Unilaterally changing wages, rates of pay, or sick leave, or granting merit increases, or in any similar manner refusing to bargain collectively with [the Union] * * * as the exclusive representative of its employees * * *.
>
> (b) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other conditions of employment with the Union as the exclusive representative of its employees * * *.

Affirmatively, the Board ordered the Company to bargain with the Union upon request and to post appropriate notices (I. 14–18).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (Lumbard, C. J., dissenting) held that, absent a finding that the employer had bargained in bad faith, the unilateral changes in wages and working conditions, even "occuring as they did during the negotiation of a collective bargaining agreement," did not *per se* constitute "a refusal to bargain collectively" within the meaning of Section 8(a)(5) (II. 439). In the court's view, "once the employer meets the union at the collective bargaining

table" "a necessary requisite of a Section 8(a)(5) violation is a finding that the employer failed to bargain in good faith" (*ibid.*), and "the fact of the unilateral change" does not necessarily require that inference. "An opportunity must first be given the employer to rebut the inference, and finally there must be a definite determination of the mental attitude of the employer" (II. 447). This determination, the court declared, "can only be effectively made in terms of the complete bargaining situation" (II. 440). Since the Board had not found that mental attitude, the court set the order aside.

The court further concluded that the Board's findings of violations of Section 8(a)(1) were not independently based but were "derived from the acts found to have violated § 8(a)(5) and that [those] violations, also [were] unproved without the necessary finding that the employer failed to act in good faith" (II. 439). The court remanded the case to the Board "in order that it may have an opportunity to take additional evidence, and make such findings as may be warranted by the record" (II. 449).

Chief Judge Lumbard dissented because in his view "certain unilateral acts during the course of collective bargaining violate § 8(a)(5) apart from any finding with respect to good faith" (II. 454).[*]

[*] On this reasoning, Chief Judge Lumbard found that, by unilaterally changing sick leave policy during the negotiations, "the employer refused to bargain with respect to a mandatory subject of bargaining in violation of § 8(a)(5)" (II. 451). He would have enforced the "order of the Board insofar as it held the unilateral grant of a wage increase which was higher than that offered to the union to be restraint or coercion under

SUMMARY OF ARGUMENT

A

The terms of Sections 8(a)(5) and 8(d) of the National Labor Relations Act, which define the obligation to bargain collectively, require the employer, upon request, to "meet and confer" with the union concerning each and every subject in the area of "wages, hours, and other terms and conditions of employment." When an employer makes a unilateral change in any of these subjects without full negotiations with the bargaining representative, he fails to "meet and confer" respecting the changes; there is thus a refusal to bargain in the most literal sense of the word. Nor does the employer's willingness thereafter to negotiate about the same general subjects and to execute an agreement eradicate this initial refusal to "meet and confer."

The view of the court below was that the employer's "good faith" is the sole measure of its performance of the obligation imposed by Sections 8(a)(5) and 8(d). This is demonstrably erroneous. The test of "good faith" serves to distinguish employers who are merely going through the outward motions of bargaining from those who are willing to enter into an agree-

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§ 8(a)(1)" (II. 452–453), but did not find the unilateral wage increase to be a violation of the bargaining obligation because "[b]y the time it was granted, the negotiations had reached an impasse" (II. 457). However, he found no violation respecting the merit increases on the ground that they "were part of the existing wage pattern and were not granted in such a way as to discriminate against union members." His view was that although "a change in merit review *procedure* could not be undertaken unilaterally * * * individual merit reviews are permissible * * *" (*ibid.* (emphasis in the original)).

ment with the union if mutually acceptable terms and conditions of employment can be arranged. One does not even reach the question of good faith until it has been shown that the obligation to "meet and confer" has been satisfied.

Unilateral action by an employer before discussion with the union has been completed also violates Section 8(a)(1) of the Act. Such action abridges the employees' Section 7 right to bargain collectively through representatives of their own choosing.

B

The Act absorbs "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346). A basic tenet of this philosophy is that terms and conditions of employment shall be established upon a foundation of mutual consent. Unilateral changes in wages and employment conditions by the employer, before the completion of negotiations on those subjects, rest on fiat rather than on mutual consent. They are thus inconsistent with the philosophy of collective bargaining and violate the policy of the Act.

Unilateral changes while negotiations are pending are also incompatible with the practicalities of collective bargaining. It is difficult to carry on negotiations when the conditions on which they are based are constantly shifting. Unilateral changes reduce the flexibility of collective bargaining by narrowing the range of possible compromises. Similarly, they impair the employees' opportunity to share in the determination of terms and conditions of employment.

Unilateral changes disparage collective bargaining and undermine the union. Such action tells the employees, more loudly than words, either that the union makes no difference or that they can get better terms from the employer without the union. In short, in its effect upon the employees, unilateral action is indistinguishable from negotiations with individual employees and minority groups, contrary to the principle of "majority rule" reflected in Section 9(a) of the Act.

C

The decisions of this and other courts confirm the view that an employer's unilateral action during contract negotiations constitutes an unfair labor practice, irrespective of his subjective good faith. See *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678; *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376.

ARGUMENT

RESPONDENT COMMITTED UNFAIR LABOR PRACTICES BY INCREASING WAGE RATES, CHANGING SICK LEAVE POLICY AND AWARDING MERIT INCREASES WITHOUT DISCUSSING THE CHANGES WITH THE CERTIFIED BARGAINING REPRESENTATIVE

A. THE WORDS OF SECTIONS 8(a) (1) AND (5) AND 8(d) SHOW THAT RESPONDENT'S UNILATERAL ACTIONS WERE UNFAIR LABOR PRACTICES

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer—

> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).[6]

Section 8(d) defines collective bargaining to include—

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *.

This part of the statutory obligation has three aspects. First, the employer must, upon request, "meet * * * and confer" with the union concerning any subject of collective bargaining presented. Second, in order to differentiate between the sham and the real, the statute requires negotiation "in good faith."[7] Third, the duty extends to each and every statutory subject of collective bargaining. If the employer fails to bargain upon a particular subject it is no defense to show that he has met and bargained as to other subjects, or even that his entire attitude has been one of good faith.[8] Conversely, if either the

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[6] Section 9(a) (discussed *infra*, p. 28) provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

[7] See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1), certiorari denied, 346 U.S. 887.

[8] See *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768–771 (C.A. 6) (merit increase), certiorari denied, 335 U.S. 814; *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960

employer or the union insists upon the inclusion of terms or conditions of employment which are not a proper subject of collective bargaining, there is a violation of the statutory obligation regardless of its *bona fides*. As the Court stated in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, in holding that the employer violated the bargaining requirements of the Act by insisting on clauses requiring a vote of the employees before calling a strike and that a union other than the certified union sign the contract (p. 349):

> The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining * * *.

(pension plan); *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C.A. 2) (group insurance); *National Labor Relations Board* v. *Niles-Bement-Pond Co.*, 199 F. 2d 713, 714 (C.A. 2) (Christmas bonus); *Richfield Oil Corp.* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909 (employee stock purchase plan).

*See, also, *American Laundry Machinery Co.* v. *National Labor Relations Board*, 174 F. 2d 124 (C.A. 6), enforcing 76 NLRB 981 (conditioning bargaining on withdrawal of unfair labor practice charges); *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686 (C.A. 2), certiorari denied, 338 U.S. 954 (illegal hiring hall provisions); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811, 812–813 (C.A. 5), certiorari denied, 342 U.S. 824 (conditioning execution of contract upon union's consent to be sued in state court); *National Labor Relations Board* v. *Berkley Machine Works & Foundry Co., Inc.*, 189 F. 2d 904 (C.A. 4) (employer's insistence on right to modify unilaterally wage rates of contract); *Douds* v. *International Longshoremen's Associa-*

It follows that an employer who makes a unilateral change in wages or conditions of employment without full negotiations with the bargaining representative fails to bargain collectively about the new term or condition of employment. Certainly, when he acts before discussion, he fails to "meet and confer"; and, if the union is contemporaneously seeking to negotiate upon the subject, there is a refusal to bargain in the most literal sense of the words. The employer's willingness thereafter to negotiate about the same general subject and to execute an agreement provided differences can be worked out does not eradicate the initial refusal to "meet and confer." The unilateral action prejudices the subsequent negotiations (see *infra*, pp. 25–27), and, at the very least, the unilaterally imposed terms remain in effect during the interval. There is, of course, the same duty to bargain about temporary conditions of employment as about those of longer duration.

Thus, in the present case, respondent and the certified representative of its employees were engaged in negotiations about a wide range of subjects including sick leave, wage rates and merit increases. Although the respondent knew that the union wished further discussion, it baldly announced a retroactive change in its sick leave policy cutting the number of days

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tion, 241 F. 2d 278 (C.A. 2) (insistence on bargaining beyond scope of certified unit); *Lion Oil Co.* v. *National Labor Relations Board*, 245 F. 2d 376, 379 (C.A. 8) (conditioning execution of contract on withdrawal of unfair labor practice charges); *Local 164, Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A.D.C.), certiorari denied, 368 U.S. 824 (insistence on performance bond).

of sick leave allowed each year but doubling the number of days which might be accumulated and carried forward from one year to another. Obviously, this new policy fell within the range of subjects on which the respondent knew that the union wished to negotiate. It is equally obvious that the company did not satisfy the obligation to "meet and confer" about the new sick leave regulations. The union was not notified. Respondent's only explanation was that it did "not feel obligated to explain the matter to you or anyone else * * *" (*supra*, p. 6). The company later put into effect the new automatic wage progression without conferring with the union about its proposal. Not only was there a failure to discuss the new system of automatic increases with the bargaining representative but the plan which the company announced unilaterally was substantially more favorable to the employees than the best offer which it had been willing to make the union. Similarly, after the union had specifically requested negotiations with respect to merit increases, the employer, without notice to or consultation with the union, granted 54 such increases among the 50 employees in the bargaining unit (*supra*, pp. 4–5). These increases, granted within the short space of three months while five bargaining meetings were held, and spread among virtually all the employees in the unit, were indistinguishable from a general wage increase." Thus, the company failed—

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[10] With respect to the merit increases, Chief Judge Lumbard would have found no violation on the ground that they "were part of the existing wage pattern and were not granted in such a way as to discriminate against union members" (II. 457). In so concluding, he relied upon *White's Uvalde Mines* v. *Na-*

and knowing the union's desire to negotiate, in effect, "refused"—to bargain collectively about these three conditions of employment. Since all three are appropriate subjects for collective bargaining, respondent's unilateral actions plainly violated Sections 8(a)(5) and 8(d).

We do not suggest that an employer may never make unilateral changes in wages, hours or other

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tional Labor Relations Board, 255 F. 2d 564, 565 (C.A. 5), and *National Labor Relations Board* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 720 (C.A. 2). However, in *White's Uvalde Mines*, only five of the 60 members of the bargaining unit were granted merit increases and in *Superior Fireproof*, a total of five employees in two geographically distinct units were accorded such increases. Indeed, in both cases, the courts specifically noted the isolated and personal nature of the increases and took care to distinguish them from such "general increases as were criticized in *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217 * * *." *White's Uvalde Mines*, at 565; *Superior Fireproof*, at 720. Assuming *arguendo* the validity of Chief Judge Lumbard's distinction between a unilateral change in merit reviews procedure and an individual merit review (but see *National Labor Relations Board* v. *J. H. Allison*, *supra*), the 54 increases granted here should fall under *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217.

Compliance with the bargaining obligation with respect to the award of individual merit increases requires that the employer, once that subject is under discussion, notify the representative of his intention to follow past procedures in awarding merit increases (see *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C.A. 7)). This affords the union an opportunity to negotiate with respect to those awards—the procedures, timing, eligible employees, etc. Where no agreement is reached prior to the appointed date for action, the employer might then consider that negotiations on that subject have reached an impasse, and award the merit increases in accordance with his announced intention (see p. 19, *infra*).

terms and conditions of employment. The Act does not freeze existing terms and conditions of employment in the absence of collective agreement; what it requires is conference and discussion plus a *bona fide* effort to agree. If an impasse is reached the employer may unilaterally put into effect new terms and conditions of employment which he has proposed in the bargaining and the union has rejected.[11] During the term of a contract an employer may take unilateral action upon subjects permitted by the agreement.[12] The Act was violated in the present case be-

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[11] See, for example, *National Labor Relations Board* v. *National Paper Co.*, 216 F. 2d 859, 863–865 (C.A. 5); *National Labor Relations Board* v. *Cambria Clay Products*, 215 F. 2d 48, 55–56 (C.A. 6); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150–151 (C.A. 7); cf. *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C.A. 9), certiorari denied, 338 U.S. 827. See also *J. I. Case Company* v. *National Labor Relations Board*, 321 U.S. 332, 337; *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, 224–225.

In the court below, respondent acknowledged that unilateral changes in employment terms undertaken prior to impasse constitute a violation of the Act's bargaining requirements. It contended, however, that such an impasse had been reached before the unilateral conduct involved herein occurred. Thus, as was stated in its brief below, "Williamsburg rests its defense on the well established doctrine that, generally speaking, the *freedom to grant a unilateral wage increase 'is limited to cases where there has been a bona fide but unsuccessful attempt to reach an agreement with the Union or where this Union bears the guilt for having broken off relations.* In such a situation, the employer has fulfilled his statutory obligation and is free to exercise his power of management.' (*N.L.R.B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C.A. 9) * * *" (Respondent's brief, p. 8, emphasis in original.)

[12] *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395, discussed p. 36, *infra*.

cause the employer, without conferring with the union, made changes which it knew the union desired to negotiate.

The error of the court below apparently stemmed from its belief that the employer's "good faith" is the sole measure of its performance of the obligation imposed by Sections 8(a)(5) and 8(d). Thus the court said that "a necessary requisite of a Section 8(a)(5) violation is a finding that the employer failed to bargain in good faith" and that "there must be a definite determination of the mental attitude of the employer" (II. 434, 447). This reasoning is wholly unsound. The test of good faith, as Chief Judge Lumbard pointed out in the dissenting opinion (II. 455–456), looks to the employer's state of mind in order to distinguish those who are merely going through the outward motions of bargaining from those who accept the union as a genuine participant in fixing terms and conditions of employment, and who are willing to enter into an agreement with the union if mutually acceptable terms and conditions of employment can be arranged. One does not even reach the question of good faith until it has been shown that the obligation "to meet and confer" has been satisfied; and that obligation must be satisfied as to each and every subject of collective bargaining (see *supra*, p. 14).[22] In the present case the new regulation

[22] As was pointed out in the article quoted by Chief Judge Lumbard (II. 455–456):

> * * * a distinction should be drawn between inquiring into the employer's state of mind in order to distinguish the sham from the real and condemning conduct which thwarts the policy of making terms of employment depend upon mutual consent. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1424 (1958).

relating to sick leave was an appropriate subject for bargaining. So were the new automatic wage progression and the merit increases. There was no bargaining about these subjects; indeed, the proposed changes were not even mentioned to the union. The failure to bargain upon these subjects was a violation of Sections 8(a)(5) and 8(d) of the Act regardless of the employer's state of mind with respect to the rest of the negotiations."[16]

In addition, respondent's unilateral action also violated Section 8(a)(1) of the Act. That provision makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7, in turn, guarantees to employees "the right to self-organization * * * [and]

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[16] Chief Judge Lumbard, who dissented, though acknowledging that the unilateral wage increase greater "than that offered to the union [constituted] restraint or coercion under § 8(a)(1)," concluded that it did not violate Section 8(a)(5) because "by the time it was granted, the negotiations had reached an impasse" (See n. 5 *supra;* II. 452-453, 457). However, the record amply supports the Board's finding that an impasse had not yet been reached. Moreover, if there were an impasse, it could have existed only as to the lesser wage offer which had previously been made to the Union, and not as to the larger increase granted the employees. *National Labor Relations Board* v. *Crompton-Highland Mills*, 339 U.S. 217, holds that, though an employer may put into effect a proposed increase after it had been offered to and rejected by the union, he may not unilaterally institute an increase greater than that offered without being in violation of Section 8(a)(1) and (5). The former action "carr[ies] no disparagement of the collective bargaining proceedings" (*id.* at 224); the latter does because it is an offer as to which the statutory representative has not been afforded its right of first rejection.

to bargain collectively through representatives of their own choosing * * *." The right to bargain collectively through a representative encompasses, as we have shown above, the right to have the representative consulted about changes in wages and other conditions of employment before action is taken thereon. Hence, where an employer makes changes in those subjects unilaterally, he not only violates his bargaining obligation to the representative, but his action at the same time has the effect of abridging the employees' Section 7 right to bargain through representatives of their own choosing (and see *supra*, pp. 27–28).[18]

[18] A majority of the court below avoided finding even a violation of Section 8(a)(1) here on the ground that the Board's finding respecting that provision was not independently based, but merely "derivative" from the finding respecting Section 8(a)(5) (II. 451). But, as Chief Judge Lumbard correctly pointed out in dissent, the "language of both the complaint * * * and the Intermediate Report of the trial examiner reveal that separate § 8(a)(1) violations were alleged and found" (II. 452). Thus, after alleging that the unilateral changes violated Section 8(a)(5), the complaint went on, in paragraph 11, to allege further that, by each unilateral change in employment conditions, the "[e]mployer did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act" (I. 8). Moreover, the trial examiner, who was affirmed by the Board in this respect, expressly found that, by its unilateral acts standing alone, respondent "interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged * * * in unfair labor practices within the meaning of Section 8(a)(1) of the Act" (I. 34). In these circumstances, it is clear that the Board made an independent, and not merely a derivative, finding of Section 8(a)(1) violations.

B. THE PHILOSOPHY OF COLLECTIVE BARGAINING AND THE POLICY OF THE NATIONAL LABOR RELATIONS ACT SHOW THAT RESPONDENT'S UNILATERAL ACTIONS WERE UNFAIR LABOR PRACTICES

The National Labor Relations Act, like the Railway Labor Act, "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346. Unilateral changes in conditions of employment, made by the employer without prior notification and conferences with the representatives designated by the employees, are as inconsistent with that philosophy as they are contrary to the statute's verbal command.

1. The philosophy of collective bargaining, and therefore the policy of the National Labor Relations Act, is that terms and conditions of employment shall be established upon a foundation of mutual consent. As early as 1920 Dr. Leiserson observed:

> Partnership between labor and capital is coming to mean that the management or the owner of the business must look upon labor as the equal of the management. When we have such a partnership, two equal partners, then one partner cannot do anything without consulting the other partner. That is partnership * * *."[10]

[10] Leiserson, *The Meaning of Labor Representation*, 90 Annals of the American Academy of Political and Social Science, 22, 23 (1920).

Another authority writing while the Wagner Act was under debate described collective bargaining as a system in which:

> The interests and predilections of the workers come to be consulted in making alterations of policy or changes in methods. The government of the business becomes at least a constitutional monarchy, and may approach "industrial democracy." [17]

Others, writing since the Act became effective, have put the point even more emphatically:

> * * * collective bargaining requires negotiations prior to any action by either party. * * * Once joint concern is established, any unilateral action is barred.[18]
>
> * * * The union certified as majority representative of the employees in a bargaining unit now must be accepted as the party of the second part in joint dealings.[19]

In short, the process of collective bargaining is regarded as one by which wages and other conditions of employment are determined through the joint determination of the employer and the representative of the employees,[20] rather than by employer fiat.[21]

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[17] Catlin, *The Labor Problem* (rev. ed. 1935), 424.

[18] Chamberlain, *The Nature and Scope of Collective Bargaining*, 58 Quarterly Journal of Economics, 359, 375, 376–378 (1944).

[19] Selekman, *Varieties of Labor Relations*, 27 Harv. Bus. Rev. 175, 177 (1949).

[20] Cf. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1408, 1423–1424 (1958).

[21] The latter system, which existed at common law, has been described as one where "the proprietors lay down the rules and the laborers are practically constrained to obey them." *Holden* v. *Hardy*, 169 U.S. 366, 397.

Agreement cannot be compelled by law. If negotiations break down, the employer is free to act unilaterally. But after a majority of the employees have designated representatives for collective bargaining, the statute can, and does, compel the employer to give the regime of joint participation through mutual consent a chance to operate successfully. Unilateral changes in wages and employment conditions by the employer, before negotiations on those subjects have been exhausted, are made by fiat. They deny employees and their representatives the right of joint participation in the formulation of those conditions."[22] Hence, such unilateral action is incompatible with the philosophy of collective bargaining and violates the policy of the Act.

2. Unilateral changes while negotiations are pending are incompatible with the practicalities of collective bargaining. One cannot build a house upon shifting sands. It is an exercise in frustration to discuss at length the merits and shortcomings of an existing sick leave or group insurance program, to consider modifications or alternatives, and then one day to learn that the ground has been pulled from under the discussions by the employer's suddenly instituting his own changes or a new plan which has never been the subject of joint deliberation.

Such changes reduce the flexibility of collective bargining by narrowing the range of possible com-

[22] The same reasoning also holds true where the employer, after reaching an impasse with the union, grants the employees terms more favorable than those previously discussed with the union. See *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, 224–225.

promises. Suppose that the union's initial request was for a 10 cents an hour increase in wage rates, an increase in sick leave from 10 to 15 days per year, and a union security clause. Were the parties to bargain jointly about these subjects, the union, finding that it was encountering employer opposition on the union-security demand, could consider "trading" that off for higher wage or sick leave benefits than originally proposed. On the other hand, were the employer immediately to put into effect a wage increase of the amount requested by the union or greater, without first consulting the union, the parties would have to bargain about the remaining subjects without using wages in the trading. If the employer next liberalized sick leave unilaterally, the parties would be forced to a "yes or no" show-down upon union security. In theory, perhaps, the greater economic benefits might be surrendered for a new union security clause. In practice the *fait accompli* cannot be reversed so easily.

For similar reasons unilateral action narrows and thus impairs the employees' opportunity to share in the determination, not only of the terms or conditions of employment which have been changed unilaterally, but also of other terms or conditions. There is always a limit upon the addition to labor costs which the employer can afford; it may be 10, 15 or 25 cents an hour. The increment might be distributed in a direct wage increase, an insurance or pension program, or vacations or holidays, or some combination. If the employer unilaterally distributes all or part in

one form, the employees lose any meaningful opportunity to bargain for it in another.

3. Unilateral changes disparage collective bargaining and undermine the union. For the employer to make such changes after a majority of the employees has chosen a representative and while the representative is seeking to bargain says to the employees, "See, the union makes no difference; I shall ignore it and establish your conditions of employment as before." Still more disparaging is putting into effect unilaterally wages or conditions of employment more favorable to the employees than any which have been offered through the union. Such action carries the message, "I will grant you, without the union, more favorable terms than any the union can obtain." Manifestly, such a threat or promise, if made expressly, would constitute interference, coercion, and restraint in violation of Section 8(a)(1). Action speaks louder than words.

The present case amply demonstrates the consequences of such misconduct. Respondent showed its scorn for the union by changing the sick leave plan without even giving the union prior notice, despite the fact that this was a subject upon which the employees were trying to negotiate through the union. Respondent disparaged the union still further by establishing a wage rate progression, without union participation, which was more liberal than any which it had offered through the union. Finally, it persisted in giving merit increases to individual employees, without collective bargaining, on so wide a scale

as to constitute a general wage increase. The inevitable result, as found by the trial examiner, was that, when an impasse in negotiations developed, the employees voted to decertify the union because they felt that without the union they "could do a better job than * * * the union had done" (I. 24; 123–124).

In reporting the Wagner bill, the Senate Labor Committee explained that the principle of majority rule established by Section 9(a) excludes methods of establishing terms of employment other than collective bargaining with the majority representative.

> Majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. * * *[28]

In its effect upon the employees and in the philosophy of collective bargaining unilateral action is indistinguishable from negotiations with individual employees and minority groups. Accordingly, all three forms of disregard for rights of the collectivity have been uniformly held to be unfair labor practices both in this Court and the courts of appeals.

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[28] S. Rep. No. 573, 74th Cong., 1st Sess., p. 13. See also *J. I. Case Company v. National Labor Relations Board*, 321 U.S. 332, 337–339.

C. THE DECISIONS OF THIS AND OTHER COURTS CONFIRM THE VIEW THAT RESPONDENT'S UNILATERAL ACTIONS DURING THE CONTRACT NEGOTIATIONS WERE UNFAIR LABOR PRACTICES

In *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217, an employer and the union representing its employees engaged in extensive negotiation about wage rates and sundry other appropriate subjects of collective bargaining until "something of an impasse" was reached (*id.* at 218). Thereafter the employer unilaterally put into effect a wage increase greater than any offered to the employees through the union. This Court held (*id.* at 223)—

> The employer engaged in an unfair labor practice when, without consulting the employees' collective bargaining representative, it put into effect, for most of its employees who had been represented in the negotiations, a general wage increase in rates of pay which was substantially greater than any that the union had offered.

The present case falls squarely under this proposition. The facts are indistinguishable from those in *Crompton-Highland Mills*. We submit that that precedent is controlling here.

The court below found a significant distinction in the fact that in the earlier case the Board had found that the employer's action showed that "the respondent was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining," whereas in the present case the Board concluded that the pleadings barred a finding upon the question of good faith. We doubt that

this Court meant to place reliance upon the employer's state of mind in the *Crompton-Highland Mills* case, certainly not in holding that his conduct was an unfair labor practice. The case, as it reached the Court, presented, *inter alia*, these issues: (a) whether the Board properly found that the unilateral wage increase violated Section 8(a) (1) and (5); and (b) whether, as contended by Crompton-Highland, circumstances arising after issuance of the Board's cease and desist order eliminated any need for its enforcement. The Court's opinion deals initially with the first issue. In holding that the employer's action constituted an unfair labor practice, the Court mentioned neither the employer's subjective state of mind nor the Board's finding as to good faith. The opinion relied upon a finding that the action interfered with, restrained and coerced the employees in the exercise of rights guaranteed under the Act (*id.* at 222, 233) and upon the argument that unilateral action of the kind involved was inconsistent with, and disparaged, the bargaining process."[*] It was only when the Court addressed itself to the second issue—whether intervening circumstances disposed of the need for enforcement of the cease and desist order—that the Court quoted the Board's find-

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[*] The Court quoted and italicized as a "significant finding" the examiner's statement (*id.* at 222, App. B):

> ** * * by granting its employees a unilateral wage increase * * * the respondent has * * * failed and refused to bargain with the Union as the exclusive collective bargaining representative of the employees * * *, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under the Act.*

ing as to good faith and only then as part of a broader finding that the unilateral action was "manifestly inconsistent with the principle of collective bargaining" (*id.* at 225). It was this inconsistency—not the employer's state of mind—on which the trial examiner and the Board had focussed attention in passages quoted by the Court.

The *Crompton-Highland Mills* case was decided largely upon the authority of two earlier decisions by this Court both of which rule, without inquiry into the employer's good faith, that unilateral action while negotiations are pending violates Section 8(a) (1) and (5). In *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U.S. 678, the employer, while wage negotiations with the union were pending, was approached by a majority of the employees with an offer to abandon the union if they could obtain certain proposed wage increases themselves. This Court held that the employer had violated Sections 8(a) (1) and (5) of the Act, quite apart from the obvious inducement it offered the employees to leave the union, because the employer disregarded its obligation to arrange terms and conditions of employment only by collective bargaining with the majority representation. The Court stated (pp. 683–685):

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, * * * it exacts "the negative duty to treat with no other." *N.L.R.B.* v. *Jones & Laughlin Corp.,* 301 U.S. 1, 44 * * *.

> • • • Bargaining carried on by the employer directly with the employees, whether a minority, or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained • • •. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation • • •.

The amount of discussion between the employer and individual employees is immaterial. Unilateral action without prior discussion is equally "subversive of the mode of collective bargaining which the statute has ordained;" it too is an unfair labor practice.

The latter point was settled in *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376. An employer, in the good faith belief that it was not required to bargain with the union certified by the Board because the unit was inappropriate, undertook to obtain War Labor Board approval for a proposed wage adjustment without consulting the union. The Court held that the employer had violated Section 8(1) because (*id.* at 384–385):

> • • • Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities • • •.
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> • • • Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no

necessity for a collective bargaining agent. * * *"

The courts of appeals have consistently held that an employer's unilateral action during the course of contract negotiations violates Section 8(a) (5) and (1) without regard to—and even in spite of—a finding as to good faith. The rule has been applied to wage rates,[10] merit increases,[11] and other conditions of em-

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[9] On similar grounds this Court, in *National Labor Relations Board* v. *Wooster Division, Borg-Warner Corp.*, 356 U.S. 342, sustained the Board's finding that the employer violated his bargaining obligation by insisting upon a provision which would have required the union to poll the employees before calling a strike—even though the proposal was made in good faith and the employer wanted to reach an agreement. The Court stated that the limitation sought "substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative. Cf. *Medo Photo Corp.* v. *Labor Board*, 321 U.S. 678" (356 U.S. at 349–350).

[10] *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 790 (C.A. 7), certiorari denied, 340 U.S. 930; *National Labor Relations Board* v. *Stilley Plywood Co., Inc.*, 199 F. 2d 319, 320 (C.A. 4), certiorari denied, 344 U.S. 933; *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 186 (C.A. 4), certiorari denied, 317 U.S. 652; *Carpinteria Lemon Association* v. *National Labor Relations Board*, 240 F. 2d 554, 557 (C.A. 9), certiorari denied, 354 U.S. 909; *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C.A. 3), *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. 2d 218, 222 (C.A. 1); *National Labor Relations Board* v. *Herman Sausage Co., Inc.*, 275 F. 2d 229, 234 (C.A. 5).

[11] *Armstrong Cork Co.* v. *National Labor Relations Boards*, 211 F. 2d 843, 847–848 (C.A. 5); *National Labor Relations Board* v. *Dealers Engine Rebuilders, Inc.* 199 F. 2d 249, 252 (C.A. 8); *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C.A. 6), certiorari denied, 335 U.S. 814.

ployment.[25] Thus, in *Armstrong Cork Co.* v. *National Labor Relations Board*, 211 F. 2d 843 (C.A. 5), the court held that the granting of merit increases after the union representative had stated "that he wanted no changes made in conditions of employment, without consulting him and without him being a party" (*id.* at 845), was an unfair labor practice. Although there was no finding that the employer acted in bad faith, the court stated (*id.* at 847):

> Good faith compliance with Sections 8(a) (5) and (1) of the Act presupposes that an employer will not alter existing "conditions of employment" without first consulting the exclusive bargaining representative * * *, and granting it an opportunity to negotiate on any proposed changes. See *N.L.R.B.* v. *Crompton-Highland Mills*, * * *. Here, we think petitioner's action in * * * granting merit increases affecting its mechanical employees, without consulting their union as requested, constituted unilateral action which naturally tended to undermine the authority of their certified bargaining representative, and violated the above sections of the Act.

Similarly, in *Lloyd A. Fry Roofing Co.* v. *National*

[25] *Lloyd A. Fry Roofing Co.* v. *National Labor Relations Board*, 216 F. 2d 273, 276 (C.A. 9) (relief periods); *National Labor Relations Board* v. *Niles-Bement-Pond Co.*, 199 F. 2d 713, 714 (C.A. 2) (Christmas bonuses); *National Labor Relations Board* v. *Proof Co.*, 242 F. 2d 560 (C.A. 7), certiorari denied, 355 U.S. 831 (seniority provisions and bulletin board use); *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 186 (C.A. 4), certiorari denied, 317 U.S. 652 (grant of paid vacation); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C.A. 3) (offer of shorter hours to employees).

Labor Relations Board, 216 F. 2d 273 (C.A. 9), the court affirmed the trial examiner's finding that the employer had violated Section 8(a)(5) by unilaterally abolishing relief periods while negotiations with the bargaining representative were pending. The court so ruled despite the examiner's finding that the employer had acted in good faith, declaring (*id.* at 276):

> An increase in wages when effected during the course of negotiations without consulting the employees' collective bargaining representative constitutes a refusal to bargain in good faith. *N.L.R.B.* v. *Crompton-Highland Mills,* * * *. Such unilateral action is considered to amount to bargaining with the employees individually rather than through their certified representative and defeats collective bargaining. * * * Such action is comparable to the action taken by the Company in this case which we hold to be an unfair labor practice."

To the same effect see *Aluminum Ore Co.* v. *National Labor Relations Board;* 131 F. 2d 485 (C.A. 7), cited in *Crompton-Highlands Mills, supra,* at 233, where the employer's unilateral wage increase was found unfair despite the Board's finding that he was acting in good faith and had subsequently reached an agreement with the union.

" Subsequent to the decision below, the Ninth Circuit has expressed agreement with the Second Circuit's analysis and conclusion in the present case (but without mentioning the prior decision in *Fry Roofing Co.*, which, we submit, is in direct conflict). *National Labor Relations Board* v. *Cascade Employers Association,* 296 F. 2d 42. This is the only other reported court of appeals decision which reaches the conclusion announced below by the Second Circuit.

The cases cited by the majority below are distinguishable. In *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, the Court held that an employer does not violate Section 8(a)(5) by bargaining in good faith for a management prerogatives clause granting him exclusive authority over certain employment conditions during the term of the contract. It is one thing for an employer to bargain with the union for unilateral control over certain subjects; it is quite another thing for the employer to exercise that power without consulting the union. *Cf.* Cox and Dunlop, *Regulations of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 401 ff. (1950). The Court laid stress upon the test of "good faith" as the measure of whether an employer was bargaining for a lawful form of contract or seeking to evade the bargaining process, but, far from indicating that bad faith was always a prerequisite to violation of Section 8(a)(5), the Court cited in footnote 20, p. 407, cases in which good faith was irrelevant.

Nor does *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, stand for the proposition for which it was cited by the court of appeals—that unilateral acts must be "tested within the framework of the entire bargaining situation" (II. 447) and may be excused upon finding a favorable mental attitude on the part of the employer. There the question was whether the Board could lawfully find that a union had failed to bargain in good faith because it had resorted, during the course of negotiations, to a form of economic pressure which

the Board believed to be disruptive of the bargaining process. Stated in general terms the question was whether the issue of "good faith" requires only an inquiry into the employer's or union's subjective state of mind for the purpose of distinguishing real from sham negotiations, or also presents such broader questions as whether their conduct in dealing with each other is consistent with good bargaining practices. In holding that the test was subjective, at least as applied to those facts, the Court nowhere implied that the legality of a refusal to deal—including its equivalents such as individual bargaining and unilateral action—depends upon the issue of subjective good faith. On the contrary, the opinion specifically recognizes that "an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the employees in matters of this nature, and hence has been condemned as a practice violative of this statutory provision. See *Labor Board* v. *Crompton-Highland Mills*, 337 U.S. 217." 361 U.S. at 485.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.[*]

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FEBRUARY 1962.

[*] The fact that the employees had acted in July, following the impasse, to decertify the Union was no bar to the relief ordered (I. 31–32, examiner's Intermediate Report). It is well established that, where the loss of a majority is attributable to unfair labor practices found, the Board is justified in ordering the employer to bargain with the union. *Franks Bros. Company* v. *National Labor Relations Board*, 321 U.S. 702.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by

either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under

which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representatives, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

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